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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-581

R. H. MACY & Co., INC. and BAMBERGER'S,
a division of R. H. MACY & Co., INC.,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN and MICROELECTRONIC SYSTEMS CORPORATION OF AMERICA, as Real Party in Interest,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1977

No.

R. H. Macy & Co., Inc. and Bamberger's,
a division of R. H. Macy & Co., Inc.,
Petitioner,

v.

United States District Court for the Eastern District of Michigan and Microelectronic Systems Corporation of America, as Real Party in Interest,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, R. H. Macy & Co., Inc.,[1] respectfully prays that a writ of certiorari issue to review the order and decision of the United States Court of Appeals for the Sixth Circuit denying petitioner's application in both cases below for a writ of mandamus to confine the *in personam* jurisdiction of the District Court within constitutional limits.

1. One of the actions below names Bambergers, an unincorporated division of R. H. Macy & Co., Inc., as defendant; effectively R. H. Macy & Co., Inc. is defendant in both actions and the single petitioner here.

Opinions Below

The opinion of the United States District Court for the Eastern District of Michigan, 434 F. Supp. 168, appears in Appendix A. The opinion of the Court of Appeals, as yet unreported, appears in Appendix B.

Jurisdiction

The order of the Court of Appeals, denying petitioner's petition for a writ of mandamus to the District Court, was entered on July 22, 1977; this Court's jurisdiction is invoked under 28 U.S.C. §§1254(1) and 2101.

Question Presented

Whether, in diversity actions, the United States District Court for the Eastern District of Michigan so departed from the accepted and usual standards of constitutional *in personam* jurisdiction by asserting jurisdiction over defendant, who neither is a citizen of nor does business in Michigan and had virtually no contacts with that State, that a writ of mandamus should have been issued by the Court of Appeals?

Statutory Provisions Involved

United States Code, Title 28:

§1651(a). Writs

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or

appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Michigan Comp. Laws Ann.:

§600.715. Same; limited personal jurisdiction

Sec. 715. The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:

(1) The transaction of any business within the state.

(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

(3) The ownership, use, or possession of any real or tangible personal property situated within the state.

(4) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

Statement of the Case

These two actions involve a dispute between Microelectronic Systems Corporation of America ("Micro"), a Michigan corporation, and R. H. Macy & Co., Inc. ("Macy's"), a New York corporation and Bamberger's, an unincorporated division of Macy's. Invoking diversity jurisdiction under 28 U.S.C. §1332(a), Micro commenced separate actions in February 1976, in the United States District Court for the Eastern District of Michigan, seeking to recover a combined total of $67,823.68, plus interest, for the purchase price of electronic watches allegedly sold by Micro to Macy's and Bamberger's.

Macy's and Bamberger's jointly moved to dismiss the complaints on the ground that—under Michigan's "long-arm" jurisdiction statute, Michigan Comp. Laws Ann. §600.715, and the due process clause of the Fourteenth Amendment—there was no *in personam* jurisdiction over Macy's.

On January 31, 1977, the District Court (Feikens, D.J.) denied defendant's motion in both cases. That court also denied defendant's motion to certify the question for interlocutory appeal, pursuant to 28 U.S.C. §1292(b).

On May 27, 1977, Macy's petitioned for a writ of mandamus to the District Court ordering dismissal of these actions, on the ground of the District Court's unconstitutional assertion of jurisdiction. On July 22, 1977, the Court of Appeals denied the petition in a one-sentence opinion, citing only a decision of this Court that mandamus would not issue to reverse a district court order for particular discovery. *Kerr* v. *United States District Court,* 426 U.S. 394 (1976) (Appendix B, p. 8a).

The underlying dispute derives from Micro's alleged sale of electronic watches to Macy's and Bamberger's during the period July through September, 1975. Based on the simple and undisputed facts presented to the court in support of defendant's motions to dismiss for lack of jurisdiction, the District Court found, first, that neither Macy's nor Bamberger's "carries on a continuous and systematic part of its general business within Michigan," and that the court therefore had no general *in personam* jurisdiction over the defendants (Appendix A, p. 3a). Next, considering the question of limited jurisdiction over the defendant under the Michigan "long-arm" statute, M.C.L.A. §600.715, the court succintly summarized the events relevant to the sales transactions, none of which occurred in Michigan, as follows:

> "Macy's was first made aware of Micro's watches when Robert Waldman of Marketing East Industries Corporation, a New York corporation acting as an independent manufacturers representative, visited Macy's buyer, James Scoroposki, on behalf of Micro and proposed the sale. After further discussion between Waldman and Scoroposki, Jerry Allen, Micro's national sales manager, came from Michigan to New York and met with Waldman and Scoroposki to discuss details of the sale. Thereafter, Scoroposki gave Waldman purchase orders for standard Microelectronic watches which Waldman then forwarded to Micro. Micro never formally confirmed the orders, but it did ship Macy's the watches.[1]

1. At least one contract for sale to Bamburger's was confirmed by Jerry Allen in a letter dated July 11, 1975. Exhibit A to Joseph Stanton affidavit. [footnote by court].

• • •

> Macy's only contact with Michigan was through the ordering of goods by mail from a corporation in Michigan * * *"[2] (Appendix A, pp. 3a-4a).

The uncontested facts before the District Court, necessarily accepted by that court, additionally showed that no merchandise was delivered to or inspected by Macy's in Michigan (See ¶¶3, 5, of affidavit of Norman Merinstein, Exhibit F to Petition for Writ of Mandamus; ¶¶3, 5, of affidavit of James Scoroposki, Exhibit G to Petition for Writ of Mandamus); title did not pass until inspection of and acceptance by Macy's (in New York or New Jersey) (See Condition 8 of Exhibit H to affidavit of Norman Merinstein, Exhibit F to Petition for Writ of Mandamus); and no representative of Macy's entered Michigan or conducted any negotiations with Micro's personnel in Michigan relating to the purchase of the watches. (See ¶¶3, 5, of affidavit of Norman Merinstein, Exhibit F to Petition for Writ of Mandamus; ¶¶3, 5 of affidavit of James Scoroposki, Ex-

2. While the District Court did not rely on the finding that Macy's ordered goods by mail from the Michigan corporation as a basis for its decision, that finding is nevertheless clearly erroneous. The uncontested affidavits before the District Court show that the watches were ordered by *personal* delivery of purchase orders to the seller's own representative in *New York* and *New Jersey*, which were then forwarded by that representative to Micro. (See ¶¶3-5 of affidavits of Robert Waldman, Exhibits F and G to Petition for Writ of Mandamus; ¶8 of affidavit of Joseph Stanton, Micro's Controller, Exhibit H to Petition for Writ of Mandamus.) (References are to the record in the Court of Appeals which petitioner has requested be certified and transmitted to this Court.) The letter written by Micro's Vice President Jerry Allen on July 11, 1975, which is the basis for the court's statement that the goods were ordered by mail, is plainly *not* a confirmation of a contract of sale, as the court states, since it was written well *before* any of the purchase orders by Macy's or Bamberger's. The undisputed evidence before the District Court establishes that neither Macy's nor Bamberger's placed any orders by mail, nor even wrote to Micro concerning the purchase of the watches.

hibit G to Petition for Writ of Mandamus). In sum, it was undisputed that every significant action related to the purchase of the Micro watches occurred in either New York or New Jersey, where both the plaintiff's Vice-President and its local sales representative sought out the defendants, solicited their business, and finally consummated the sales transactions which are the basis for these actions.

Petitioner agrees with the District Court that "Michigan, like several other jurisdictions, has interpreted its long-arm statute (M.C.L.A. §600.715) as being the broadest grant of jurisdiction consistent with the constitutional requirements of due process." (Appendix A, p. 4a). In the face of the District Court's acknowledgement that Macy's and Bamberger's were "merely * * * passive out-of-state buyer[s] of an in-state product" [Appendix A, p. 5a],[3] however, the court's decision that they were subject to the court's jurisdiction exceeds the limits of constitutional power. The District Court, in effect, obliterated State lines and the constitutional limits of State power in the final paragraph of its opinion, by saying:

> "Finally, in modern business practice, companies buy and sell products in all parts of our country. Distance is no longer a factor in these relationships. In a commercial sense business activity realistically is not concerned with state boundaries. What seems to dominate these relationships is the obtaining a good product at the lowest cost that can be sold at a profit. Viewed in this way it is reasonable to exercise jurisdiction in a case such as this." (App. A, p. 7a)

3. This distinction between "passive" and "active" buyers as the touchstone for declining *in personam* jurisdiction as to the former and for asserting it as to the latter, has been stated by the Court of Appeals for the Sixth Circuit, *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220, 233 (6th Cir. 1972), as well as by a significant number of other courts in other circuits. See pp. 9-11, below.

Reasons for Granting the Writ

I. In these diversity cases, the District Court, and the Court of Appeals by its denial of mandamus, clearly departed from the legal standards articulated by this Court for the constitutional exercise by States of *in personam* jurisdiction as applied by virtually all other federal courts.

International Shoe Co. v. *Washington,* 326 U.S. 310 (1945), *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957), and *Hanson* v. *Denckla,* 357 U.S. 235 (1958) are the leading decisions by this Court on the constraints which the due process clause of the Fourteenth Amendment imposes on the assertion by a State of *in personam* jurisdiction over foreigners. *Shaffer* v. *Heitner,* 97 S.Ct. 2569, 2580 (1977), in extending the analysis of those cases to *quasi in rem* jurisdiction, reaffirmed that "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

The Court of Appeals for the Sixth Circuit, like the First Circuit and other courts in other circuits, in applying the principles set forth in *International Shoe* and its progeny, has distinguished between an out-of-State "passive buyer" and an "active buyer." *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.,* 466 F.2d 220, 233 (6th Cir. 1972). A "passive buyer" is one "simply placing an order, accepting the seller's price and terms as stated in his product advertising and agreeing only to pay a sum upon receipt of the goods or service." An "active buyer" is one who

"vigorously negotiates, perhaps dictates, contract terms, inspects production facilities and otherwise departs from the passive buyer role." *Id.* at 233.

Since the District Court accurately characterized Macy's (and Bamberger's) as someone "who merely acted as a passive out-of-state buyer of an in-state product" (Appendix A, p. 5a), the Court of Appeals should have granted the writ of mandamus.[4] In a similar factual situation, the Court of Appeals for the First Circuit held that, under the Massachusetts "long-arm" statute, the United States District Court had no jurisdiction over two foreign corporations which had placed orders with a Massachusetts corporation, without any additional significant contacts with the forum state. *Whittaker Corp.* v. *United Aircraft Corp.,* 482 F.2d 1079, 1084-1085 (1st Cir. 1973). *Accord*: *Anderson* v. *Shiflett,* 435 F.2d 1036 (10th Cir. 1971).

The same constitutional limitation has been affirmed by virtually all the other United States District Courts that have considered the question of *in personam* jurisdiction under a State long-arm statute over a non-resident buyer whose contacts with the forum were as passive and insubstantial as those involved in this case. *United Advertising Agency, Inc.* v. *Robb,* 391 F. Supp. 626, 628-631 (M.D. North Carolina 1975); *Klein* v. *E. W. Reynolds Co., Inc.,* 355 F. Supp. 886 (S.D.N.Y. 1973); *Garrett* v. *R. H. Macy & Co., Inc.,* 360 F. Supp. 872, 877 (E.D. Tennessee 1972); *Oklahoma Publishing Co.* v. *National Sportsmen's Club, Inc.,* 323 F. Supp. 929, 930-931 (W.D. Oklahoma 1971); *McQuay, Inc.* v. *Samuel Schlosberg, Inc.,* 321 F. Supp. 902, 907 (D. Minnesota 1971); *Geneva Industries, Inc.* v. *Copeland Con-*

4. That court denied the writ not because of any differing view as to the constitutional limits of *in personam* jurisdiction, but because of its erroneous view that mandamus was not available. See Point II, below.

struction Corp., 312 F. Supp. 186, 188 (N.D. Illinois 1970); *Guardian Packaging Corp.* v. *Kapak Industries, Inc.*, 316 F. Supp. 952, 955 (D. Minnesota 1970); *Oswalt Industries Inc.* v. *Gilmore*, 297 F. Supp. 307, 313 (D. Kansas 1969); *Chassis-Trak, Inc.* v. *Federated Purchaser, Inc.*, 179 F. Supp. 780, 791 (D. New Jersey 1960). *But cf. Simpson Timber Co.* v. *Great Salt Lake Minerals and Chemicals Corp.*, 296 F. Supp. 243 (D. Oregon 1969).

Not only is the District Court's decision here, left standing by the Court of Appeals order, contrary to the above-cited federal decisions which almost unanimously hold a "passive" buyer immune from long-arm jurisdiction, it is contrary, as well, to the nearly unanimous decisions of the State courts which have considered this question. Indeed, the District Court recognized that its decision was contrary to the decisions of four State courts which held there was no *in personam* jurisdiction over an out-of-State buyer in similar circumstances (Appendix A, p. 5a, n.2).[5] *E.R. Callender Printing Co.* v. *The District Court In and For the*

5. As the District Court said (Appendix A, p. 6a) "[d]etermining the outer limits of *in personam* jurisdiction permitted by the due process clause is a federal question"; nevertheless, it found "persuasive" the decision of the Michigan Court of Appeals in *Anderson, Clayton & Co.* v. *Atlas Concrete Pipe, Inc.*, 41 Mich. App. 58, 199 N.W.2d 531 (Ct. App. 1972), that jurisdiction existed under the Michigan long-arm statute. However, neither *Anderson, Clayton & Co.* nor the other State court decision cited by the District Court, *Colony Press, Inc.* v. *Fleeman*, 17 Ill. App. 3d 14, 308 N.E. 2d 78 (Ct. App. 1974), involved "passive buyers." They involved buyers who, unlike Macy's, (1) initiated the transactions giving rise to the lawsuit by first communicating with the forum-based seller in the forum State; (2) placed their orders directly with the seller by phone and mail; and (3) did not order standard catalog items from set price lists but required the seller in each instance to deliver special orders designed to meet their particular specifications. *Colony Press, Inc.* was, in fact, distinguished on this basis in a later case which held there was no jurisdiction when an Illinois seller initiated the negotiations in California. *Artoe* v. *Mann*, 36 Ill. App. 3d 204, 343 N.E.2d 647, 649 (Ct. App. 1976).

Second Judicial District, 182 Colo. 25, 510 P.2d 889 (1973) (*en banc*); *O. N. Jonas Co.* v. *B & P Sales Corp.*, 232 Ga. 256, 206 S.E.2d 437 (1974); *NRM Corp.* v. *Pacific Plastic Pipe Co.*, 36 Ohio App.2d 179, 304 N.E.2d 248 (Ct. App. 1973); *Architectural Building Components Corp.* v. *Comfort*, 528 P.2d 307 (Okla. 1974). Our research reveals that eleven additional State courts have also held that there is no *in personam* jurisdiction over a buyer in the circumstances of Macy's and Bamberger's. *Interdyne Co.* v. *SYS Computer Corp.*, 31 Cal. App. 3d 508, 107 Cal. Rptr. 499 (Ct. App. 1973); *Artoe* v. *Mann*, 36 Ill. App. 3d 204, 343 N.E.2d 647 (Ct. App. 1976); *Rath Packing Co.* v. *Intercontinental Meat Traders, Inc.*, 181 N.W.2d 184 (Iowa 1970); *"Automatic" Sprinkler Corporation of America* v. *Seneca Foods Corp.*, 361 Mass. 441, 280 N.E.2d 423 (1972); *Branstrom & Associates, Inc.* v. *Community Memorial Hospital*, 296 Minn. 366, 209 N.W.2d 389 (1973); *M. Katz & Sons Billiard Products, Inc.* v. *G. Correale & Sons, Inc.*, 20 N.Y. 2d 903, 285 N.Y.S.2d 871 (1967); *William R. Andrews Associates* v. *Sodibar Systems of D.C., Inc.*, 28 N.C. App. 663, 222 S.E.2d 922 (Ct. App. 1976); *Neptune Microfloc, Inc.* v. *First Florida Utilities, Inc.*, 261 Or. 494, 495 P.2d 263 (1972); *Darby* v. *Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423 (1970); *U-Anchor Advertising, Inc.* v. *Burt*, 544 S.W.2d 500 (Texas Civil App. 1976), *aff'd*, —— S.W.2d ——, No. B-6516 slip op. (Texas July 13, 1977); *Transwestern General Agency* v. *Morgan*, 526 P.2d 1186 (Utah 1974); *cf. Misco-United Supply, Inc.* v. *Richards of Rockford, Inc.*, 215 Kan. 849, 528 P.2d 1248 (1974); *contra*: *Prentice Lumber Co.* v. *Spahn*, 156 Mont. 68, 474 P.2d 141 (1970).

The decision of the District Court that there is *in personam* jurisdiction over the defendant in both cases

crosses any reasonable line for the assertion of long-arm jurisdiction, as established by the numerous federal and State court decisions cited above. Indeed, it serves to obliterate any line at all by its focus on "modern business practice" which, in its view, is such that "[i]n a commercial sense, business activity realistically is not concerned with state boundaries." (Appendix A, p. 7a). The difficulty with that formulation is that, in a constitutional sense, the courts must be concerned with state boundaries; by failing to observe such boundaries, the District Court plainly exceeded its jurisdiction and announced a mischievous doctrine. It should be suppressed by this Court before it spawns unlimited and unwarranted extensions of the reach of State judicial process, in violation of this Court's established doctrine that exercise of *in personam* jurisdiction must be based on such contacts with the State as lead to the judgment that it is fundamentally fair to summon the defendant to that forum.

II. A writ of mandamus is the appropriate remedy for correcting an overreaching by the District Court of its jurisdiction which presages the obliteration of State lines.

The Court of Appeals denied the petition for a writ of mandamus, pursuant to 28 U.S.C. §1651(a), on the ground "that petitioners have failed to show the existence of the exceptional circumstances which will justify the granting of this extraordinary remedy." It correctly observed that a writ of mandamus is an "extraordinary remedy" and requires "the existence of * * * exceptional circumstances," but failed to see that these cases meet those tests. In the very case which the Court of Appeals

cited to justify its denial of the writ, *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976), this Court recently said:

> "As we have observed, the writ 'has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."' Will v. United States, [389 U.S. 90 (1967)] supra, at 95, quoting Roche v. Evaporated Milk Assn. 319 U.S. 21, 26 (1943)."

Conformably to this Court's statement of the traditional use of the writ, these are cases in which the writ should have issued. The facts, as found by the District Court, are uncomplicated and uncontradicted. Moreover, on the jurisdictional question, nothing will be added by a full trial. In view of the admitted and uncontradicted course of events, no proof of greater contact with the State of Michigan can be adduced, nor is any additional proof necessary under the District Court's decision. Under virtually every decision under the due process clause, however, the District Court, on these facts, far exceeded the constitutional limits to its derivative State jurisdiction. When such jurisdictional overreaching is so plain, it must be corrected by the Court of Appeals on petition for mandamus, or by this Court, else there is no established use for the writ in confining the District Court "to a lawful exercise of its prescribed jurisdiction."[6]

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6. This Court has not since *International Shoe* instructed the lower courts on the use of the writ of mandamus to confine those courts to their prescribed jurisdiction in diversity cases. *Cf. American Airlines* v. *Forman*, 204 F.2d 230, 232 (3d Cir. 1953); *Holub Industries, Inc.* v. *Wyche*, 290 F.2d 852, 855 (4th Cir. 1961).

Conclusion

Because the District Court unconstitutionally extended the reach of State jurisdiction in these diversity cases, and the Court of Appeals failed to confine the court to its legal jurisdiction, this Court should now issue a writ of certiorari to review the order of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

CIVIL ACTION No. 6-70293

MICROELECTRONIC SYSTEMS CORPORATION OF AMERICA,
a Michigan corporation,

Plaintiff,

v.

BAMBERGER'S, a Division of R.H. MACY & Co., INC.,

Defendant.

CIVIL ACTION No. 6-70294

MICROELECTRONIC SYSTEMS CORPORATION OF AMERICA,
a Michigan corporation,

Plaintiff,

v.

R.H. MACY & Co., INC., a New York corporation,

Defendant.

MEMORANDUM OPINION

Plaintiff, Microelectronic Systems Corporation of America [Micro], brings these diversity actions against defend-

ants, Bamberger's, a Division of R. H. Macy &Co., Inc. and R. H. Macy & Co., Inc. [Macy's]. Plaintiff alleges that each defendant ordered and received shipments of certain electronic watches manufactured by plaintiff and that both defendants failed to remit the sums owing to plaintiff for their purchases. In each case suit is for the unpaid purchase price and is based on the alternative theories of account stated, breach of contract and tort.

Defendant, in each case, moves for dismissal on the ground that this court lacks personal jurisdiction over it. Since the substance of the arguments presented in both cases is the same, the court considers the two motions together. For convenience the court will write only of the facts as they pertain to defendant Macy's. The facts in the case against Bamberger's are substantially similar, and all the reasoning applies by analogy.

As a United States District Court sitting in Michigan this court looks to Michigan law to determine whether there is personal jurisdiction over the defendant. *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938). Micro claims first that this court has general personal jurisdiction over Macy's under M.C.L.A. §600.711 for the reason that Macy's "carries on a continuous and systematic part of its general business within Michigan." M.C.L.A. §600.711(3). Macy's replies, by affidavit of its Vice President-Legal, that it "is not qualified to do business in the State of Michigan; maintains no offices, has no telephone listing, and no employees in the State of Michigan; and does not regularly ship goods into or advertise goods for sale in the State of Michigan." *See* Ely Kushel Affidavit. Micro does not refute these

statements but instead asks for opportunity to conduct discovery in order to demonstrate that Macy's has enough contacts with Michigan to give this court general personal jurisdiction over it. Since the burden is on the plaintiff to show the court's *in personam* jurisdiction over defendant, *Weller* v. *Cromwell Oil Co.,* 504 F.2d 927 (6th Cir. 1974), Micro's failure to controvert the defense affidavit compels a finding of no general *in personam* jurisdiction over Macy's.

Micro claims also that this court has jurisdiction over Macy's under M.C.L.A. §600.715 which gives the court limited personal jurisdiction over a foreign corporation if it transacts any business within Michigan; does or causes any act to be done or consequences to occur in Michigan resulting in an action for tort; owns, uses, or possesses any real or tangible personal property situated in Michigan; contracts to perform services or furnish materials in Michigan. Since limited personal jurisdiction extends to all causes of action arising out of the facts which give jurisdiction, the question becomes whether, *vel non,* Macy's, a New York Corporation, had sufficient contact with Michigan, as defined under M.C.L.A. §600.715, during the course of its watch purchases from the Michigan corporation, Micro.

Macy's was first made aware of Micro's watches when Robert Waldman of Marketing East Industries Corporation, a New York corporation acting as an independent manufacturers representative, visited Macy's buyer, James Scoroposki, on behalf of Micro and proposed the sale. After further discussion between Waldman and Scoroposki, Jerry

Allen, Micro's national sales manager, came from Michigan to New York and met with Waldman and Scoroposki to discuss details of the sale. Thereafter, Scoroposki gave Waldman purchase orders for standard Microelectronic watches which Waldman then forwarded to Micro. Micro never formally confirmed the orders, but it did ship Macy's the watches.[1]

Micro contends that Macy's purchase by mail of watches manufactured in Michigan constitutes the transaction of business in Michigan and gives this court jurisdiction over Macy's under M.C.L.A. §600.715(1).

Macy's only contact with Michigan was through the ordering of goods by mail from a corporation in Michigan, but it is well settled that in a proper case a single contact with the forum state not involving the physical presence of the defendant can be enough to give jurisdiction over the defendant. *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); *Kiefer* v. *May*, 46 Mich. App. 566 (1973); *Hadad* v. *Lewis*, 382 F. Supp. 1365 (E.D. Mich. 1974); *Mad Hatter, Inc.* v. *Mad Hatters Night Club Co.*, 399 F. Supp. 889 (E.D. Mich. 1975).

Michigan, like several other jurisdictions, has interpreted its long-arm statute (M.C.L.A. §600.715) as being the broadest grant of jurisdiction consistent with the constitutional requirements of due process. *Sifers* v. *Horan*, 385 Mich. 195 (1971); *Schneider* v. *Linkfield*, 389 Mich. 608 (1973); *Stan Sax Corp.* v. *Siefen Compounds, Inc.*, 68 Mich. App. 768 (1976). Several jurisdictions have

1. At least one contract for sale to Bamberger's was confirmed by Jerry Allen in a letter dated July 11, 1975. Exhibit A to Joseph Stanton affidavit.

concluded that the due process limitations prevent a state from taking jurisdiction over a defendant such as Macy's who merely acted as a passive out-of-state buyer of an in-state product. The United States District Court for the Eastern District of Tennessee, for example, recently held that to permit Tennessee to take jurisdiction over a foreign corporation which had ordered Tennessee goods by mail would offend the "traditional notions of fair play and substantial justice" mandated by the due process clause. *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316 (1945), quoted in *Garrett* v. *R.H. Macy & Co., Inc.*, 360 F. Supp. 872, 877 (1972),[2] citing *Darby* v. *Superior Supply Co.*, 458 S.W.2d 423 (Tenn. 1970).

Michigan, in contrast, has indicated that due process considerations do not prevent taking jurisdiction over a passive buyer. In *Anderson, Clayton & Co.* v. *Atlas Concrete Pipe, Inc.*, 41 Mich. App. 58 (1972), the Michigan Court of Appeals gave full faith and credit to a Texas judgment against a Michigan corporation. The Texas court had concluded that it had jurisdiction over the passive Michigan buyer under Texas law which provided that ". . . any foreign corporation . . . shall be deemed doing business in this state by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this state . . ." Texas Rev. Stat. Art. 2031b §4. The Michigan Court of Appeals decided that the Texas statute accorded with the

2. For examples of other cases interpreting similar statutes and finding no jurisdiction over a defendant buyer in similar circumstances, *see O.N. Jonas Co., Inc.* v. *B & P Sales Corp.*, 206 S.E.2d 437 (Ga. 1974); *Architectural Building Components Corp.* v. *Comfort*, 528 P.2d 307 (Okla. 1974); *Callender Printing Co.* v. *The District Court In and For the Second Judicial District*, 510 P.2d 889 (Colo. 1973); *NRM Corp.* v. *Pacific Plastic Pipe Co.*, 304 N.E.2d 248 (Ohio App. 1973).

requirements of due process. Since the Michigan long-arm statute is considered the broadest grant of jurisdiction consistent with the requirements of due process, the logical application of *Anderson, Clayton & Co.* would allow this court to take jurisdiction over Macy's in the instant case. *See also Colony Press, Inc.* v. *Fleeman,* 308 N.E.2d 78 (Ill. App. 1974).

Determining the outer limits of *in personam* jurisdiction permitted by the due process clause is a federal question, and, therefore, the Michigan Court of Appeals decision in *Anderson, Clayton & Co.* is not controlling, although it may be persuasive. The United States Supreme Court has defined the due process limitations on obtaining *in personam* jurisdiction over a defendant in three cases: *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *McGee* v. *International Life Insurance Co.,* 344 U.S. 220 (1957); *Hanson* v. *Denckla,* 357 U.S. 235 (1958). From these cases the United States Court of Appeals for the Sixth Circuit has developed three criteria for determining the outer limits of constitutionally permitted *in personam* jurisdiction:

> First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.
>
> *Southern Machine Company* v. *Mohasco Industries, Inc.,* 401 F.2d 374, 381 (6th Cir. 1968).

See also In-Flight Devices Corp. v. *Van Dusen Air, Inc.,* 466 F.2d 220, 226 (6th Cir. 1972); *King* v. *Hailey Chevrolet Co.,* 462 F.2d 63, 67 (6th Cir. 1972); *Davis H. Elliot Co.* v. *Caribbean Utilities Co.,* 513 F.2d 1176, 1181 (6th Cir. 1975).

The court holds that it has jurisdiction over Macy's. Macy's purposely availed itself of the privilege of acting in Michigan when it entered into a contract with a Michigan corporation at least a part of which was to be performed in Michigan. The cause of action arises out of the enforcement of that contract.

Finally, in modern business practice, companies buy and sell products in all parts of our country. Distance is no longer a factor in these relationships. In a commercial sense business activity realistically is not concerned with state boundaries. What seems to dominate these relationships is the obtaining a good product at the lowest cost that can be sold at a profit. Viewed in this way it is reasonable to exercise jurisdiction in a case such as this.

Accordingly, defendants' motions to dismiss for lack of personal jurisdiction are denied. Appropriate orders may be submitted.

/s/ JOHN FEIKENS

JOHN FEIKENS
United States District Judge

Date: January 31, 1977,
Detroit, Michigan.

APPENDIX B

Opinion and Order of the Court of Appeals

No. 77-1308

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

R. H. MACY & Co., INC. and BAMBERGER'S,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, AT DETROIT,

Respondent.

Before: CELEBREZZE, PECK and LIVELY, Circuit Judges.

This matter having come before the Court on Petitioners' Petition for Writ of Mandamus and it appearing that petitioners have failed to show the existence of the exceptional circumstances which will justify the granting of this extraordinary remedy, *Kerr* v. *U.S. District Court,* 426 U.S. 394 (1976),

It is ORDERED that the Petition for Writ of Mandamus be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-581

R. H. MACY & CO., INC., and
BAMBERGER'S, a Division of
R. H. MACY & CO., INC.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
MICHIGAN AND MICROELECTRONIC
SYSTEMS CORPORATION OF AMERICA,
as Real Party in Interest,

Respondents.

/

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES DISTRICT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1977

NO.

R. H. MACY & CO., INC., and BAMBERGER'S, a Division of R. H. MACY & CO., INC.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND MICROELECTRONIC SYSTEMS CORPORATION OF AMERICA, as Real Party in Interest,

Respondents.

---/

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondents hereby respectfully submit this Brief in Opposition to a Petition for a Writ of Certiorari to review the Order and Decision of the United States Court of Appeals for the Sixth Circuit denying Petitioners' Application for a Writ of Mandamus to the United States District Court for the Eastern District of Michigan.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Court of Appeals properly denied Petitioners Application for a Writ of Mandamus when the facts clearly show (i) a total lack of the "exceptional circumstances" required to justify the granting of this extraordinary remedy; (ii) a case which is legally and factually difficult in which the District Court exercised its discretionary powers; (iii) the existence of a readily available alternative remedy; and (iv) the Petitioners' failure to demonstrate that their right to the issuance of the Writ is clear and undisputable

II. Whether the District Court's assertion of Limited In Personam Jurisdiction over Petitioners is in accordance with applicable Michigan Statutory law or violates the due process provision of the Fourteenth Amendment to the United States Constitution in view of the facts which clearly indicate that (i) the Michigan Statute relied upon by the District Court is to be given the broadest allowable construction consistent with due process requirements; (ii) Petitioners purposely availed themselves of acting in Michigan through the execution of a contract, a part of which was to be performed in Michigan, which actions give rise to the instant litigation and (iii) the assertion of Limited In Personam jurisdiction is reasonable in light of the existing facts.

COUNTERSTATEMENT OF THE CASE

The statement by Petitioners that "the Court succinctly summarized" the underlying facts relating to the sales transaction between Petitioners and Respondents (Petitioner, P. 5) improperly implies that this summary was intended to cover all "events relevant" to the sales transactions. (Petition, P. 5, 1st Paragraph).

There are other relevant events which were not "succinctly summarized" which occurred in Michigan and which support the District Court's ruling. Pursuant to Macy's shipping order, delivery of the merchandise was to a preferred carrier within the State of Michigan for shipment F.O.B. Madison Heights, Michigan. Therefore, pursuant to the applicable provision of the Michigan Uniform Commercial Code, risk of loss and title to the

goods passed to Petitioners in the State of Michigan. Respondents submit that Petitioners assertion that "every significant action" occurred other than in Michigan (Petition, P. 7) is factually untrue.

The District Court's remark that "Macy's acted as a passive, out-of-state buyer of an in-state product" must be read with the opinion findings that such status was an arguably sufficient basis for Limited In Personam jurisdiction. It is not, therefore, conclusive, as asserted by Petitioners, that the District Court's decision in regard thereto "exceeds the limits of constitutional power". (Petition, P. 7). Further, the statement by Petitioners that the District Court "in effect, obliterated state lines and the Constitutional limits of State Power" (Petition, P. 7) is conclusory and out of context.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS ACTED IN ACCORDANCE WITH ESTABLISHED LEGAL PRECEDENT IN DENYING PETITIONERS' APPLICATION FOR A WRIT OF MANDAMUS BECAUSE THE FACTS OF THIS CASE CLEARLY INDICATE THE ABSENCE OF THE EXCEPTIONAL CIRCUMSTANCES WHICH WILL JUSTIFY THE GRANTING OF THIS EXTRAORDINARY REMEDY.

As early as 1872, this Court indicated that in cases involving judicial duty, the purpose of the Writ of Mandamus is to direct a court to exercise its judicial discretion or judgment, without direction as to the manner in which it shall be accomplished. Further, this Court stated that a Writ of Mandamus should not be issued to correct a judicial error. *Ex Parte Newman*, 81 U.S. 152 (1872). These principals are supported by numerous decisions, the more recent of which tend to greatly restrict the situations in which a Writ of Mandamus can properly be applied.[1]

---

1. *Kerr* v. *U.S. District Court*, 426 U.S. 394 (1976); *Will* v. *United States*, 389 U.S. 90 (1967); *BancOhio Corp.* v. *Fox*, 516 F. 2d 29 (6th Cir. 1975); *Grace Lines, Inc.* v. *Motley*, 439 F. 2d 1028 (2nd Cir. 1971); *Carter* v. *Seamans*, 411 F. 2d 767 (5th Cir. 1969), (cert. denied 397 U.S. 951); *Thornton* v. *Corcoran*, 407 F. 2d 695 (D.C. 1969); *Schillinger* v. *U.S. Dept. of Justice, Federal Bureau of Investigation*, 259 F. Supp. 29, (M.D. Pa. 1966).

The Court of Appeals, in denying Petitioners' Application for a Writ of Mandamus, relied on this Court's decision in *Kerr* v. *U.S. District Court*, 426 U.S. 394 (1976). Mr. Justice Marshall, delivering the Court's opinion, pointed out that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Kerr, surpa*, at 402. In addition, this Court established a further condition:

> ". . . (T)he party seeking issuance of the writ have no other adequate means to obtain the relief he desires . . . and that he satisfy "the burden of showing that (his) right to issuance of the writ is 'clear and indisputable' ". *Kerr, supra*, at 403.

Petitioners have failed to convince the Court of Appeals that such exceptional circumstances and conditions exist and indeed they do not. Petitioners have the right to appeal the District Court in the event Petitioners fail to prevail on the merits. Further, there being obvious dispute as to the appropriateness of the District Court's exercise of jurisdiction in this case, Petitioners have not carried the burden of showing a "clear and indisputable" right to issuance of the Writ.

In *Grace Lines, Inc.* v. *Motley*, 439 F. 2d 1028 (2nd Cir. 1971), the Court stated that the purpose of the All Writs Act (28 U.S.C.A. §1651), is to enable federal appellate courts to review by mandamus, non-appealable interlocutory orders which would be the subject of review on appeal from a final judgment. More specifically, according to that Court, "mandamus will lie in the sound discretion of the appellate court, where the trial court has exceeded or wrongfully refused to exercise its judicial power or has committed a clear abuse of discretion". *Id*, at 1029. Indeed, this Court has been quite clear in indicating that the purpose and scope of mandamus is not to control decisions of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power. *Will* v. *United States*, 389 U.S. 90 (1967). It appears equally clear that the standards of "exceptional circumstances" or "clear abuse of discretion" have not been met in the instant case. The Court of Appeals felt it adequate to dismiss the request for a Writ of Mandamus in a one-sentence opinion relying on *Kerr, supra*.

Although a Writ of Mandamus may be granted to confine a court to lawful exercise of prescribed jurisdiction, it is clearly not

to be granted every time there is a dispute involving the jurisdiction of a Federal Court. As stated by the Sixth Circuit Court of Appeals in *BancOhio Corp.* v. *Fox*, 516 F. 2d 29 (6th Cir. 1975):

> "This is not to say that mandamus is appropriate at any time there is an issue of subject matter jurisdiction. *Issuance of the writ is appropriately denied where the question of jurisdiction is factually and legally difficult.*" *Id*, at 33 in citing *Massey-Harris-Ferguson, Ltd.* v. *Boyd*, 242 F. 2d 800 (6th Cir. 1957).

It cannot be denied that the instant case involves factual disputes as well as harsh disagreement regarding the proper exercise of the District Court's discretionary powers. As stated by the Fourth Circuit Court of Appeals in *Holub Industries, Inc.* v. *Wyche*, 290 F. 2d 852 (4th Cir. 1961), quoting from *American Airlines*, v. *Forman*, 204 F. 2d 230 (3rd Cir. 1953):

> "The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute of settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error." *Id*, at 232.

Through no stretch of the imagination or otherwise, can it be argued that the decision of the learned District Judge Feikens and/or the legal position of the Respondents lacks rational and substantial legal and factual merits. Therefore, Mandamus is not appropriate.

Likewise, in order to prevail, Petitioners must show that it has no other adequate remedy. As stated by the Ninth Circuit Court of Appeals in *Hartley Pen Co.* v. *U.S. District Court*, 287 F. 2d 324 (9th Cir. 1961):

> "In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedies are inadequate and there are present exceptional and extraordinary circumstances which require the issu-

> ance of an extraordinary writ to prevent a grave miscarriage of justice . . ." *Id*, at 328 (Emphasis added). See also *Kerr* v. *U.S. District Court*, 511 F. 2d 192 (N.D. Cal 1975).

In the present case, Petitioners have an adequate remedy by appeal of any final decision of the District Court. Further, the factual circumstances underlying the denial of the writ hardly represent "a grave miscarriage of justice." Granting the writ would only move the trial on the merits to New York where Bamberger's (a New Jersey store) could contend there was no jurisdiction. Jurisdiction would still be a difficult question because Macy's-New York, orders, warehouses, reships, bills and collects centrally for goods shipped all over the United States to its stores and divisions—apparently expecting to send the out-of-state vendor on a jurisdictional egg hunt around the United States searching for proper jurisdiction.

The Court in *Carter* v. *Seamans*, 411 F. 2d 767 (5th Cir. 1969) set forth a three-pronged test for determining the appropriateness of mandamus in a particular case:

> "(1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. In connection with the last requirement, it is important to bear in mind that mandamus does not supercede other remedies, but rather comes into play where there is a want of such remedies. Admittedly, the alternative remedy must be adequate, i.e., capable of affording full relief as to the very subject matter in question." *Id*, at 773.

As illustrated by the preceding authorities, there are diverse criteria and/or requirements which relate to the propriety of the grant or denial of a petition for a Writ of Mandamus in cases involving jurisdictional disputes. The facts of this case make it abundantly clear that:

> 1. No exceptional circumstances exist which justify the granting of Petitioners Application for a Writ of Mandamus, an extraordinary remedy;

> 2. Under no circumstances can the Petitioners satisfy their burden of showing that their right to the granting of the Writ is "clear and indisputable";
>
> 3. The case is factually and legally difficult, involving the District Court's exercise of discretion, and does not involve a refusal by the District Court to adhere to unambiguous or undisputed provisions of statute or law. Substantial and rational legal argument can be made to support the position of Respondent.
>
> 4. Petitioners have an adequate alternative remedy.
>
> 5. The District Court had no "clear duty" to refuse jurisdiction and the Petitioners had no "clear right" to the relief which they sought in the District Court.

For these reasons this Court should deny Petitioners Petition for a Writ of Certiorari.

II. THE ASSERTION OF LIMITED IN PERSONAM JURISDICTION OVER PETITIONERS BY THE DISTRICT COURT, BASED ON THE FACTS OF THIS CASE, DOES NOT VIOLATE ESTABLISHED CONCEPTS OF DUE PROCESS OR TRADITIONAL NOTIONS OF FAIR PLAY AND IS IN ACCORDANCE WITH APPLICABLE MICHIGAN STATUTORY LAW.

Michigan, the forum jurisdiction, has recently held that the "limitations on state power imposed by *International Shoe* and its progeny have been applied narrowly in Michigan, *particularly where an ordinary commercial transaction is involved.*"[2] *Cole* v. *Doe*, 77 Mich. App. 138, 142 (1977) (emphasis added), citing *Dornbos* v. *Atkins Transfer Co.*, Inc., 9 Mich. App. 515; 157 N.W. 2d 498 (1968); *Woods* v. *Edgewater Amusement Park*, 381 Mich. 559; 165 N.W. 2d 12 (1969); *Crane* v. *Rothring*, 27 Mich. App. 189; 183 N.W. 2d 434 (1970).

---

2. It is emphasized that "Michigan, like several other jurisdictions, has interpreted its long-arm statute as being the broadest grant of jurisdiction consistent with the Constitutional requirements of due process." (Petitioners' Appendix, P. 4a) *Sifers* v. *Horen*, 358 Mich. 195, 188 N.W. 2d 623 (1971); *Schneider* v. *Linkfield*, 389 Mich. 608 209 N.W. 2d 225 (1973); *Stan Sax Corp.* v. *Siefen Compounds, Inc.*, 69 Mich. App. 768, 243 N.W. 2d 724 (1976).

Michigan Courts have upheld limited personal jurisdiction based upon a single contact with the forum state. *Keifer* v. *May*, 46 Mich. App. 566; 208 N.W. 2d 537 (1973). That "single contact" need not include physical presence within the forum. *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F. 2d 220 (6th Cir. 1972); *Hadad* v. *Lewis*, 382 F. Supp. 1365 (E.D. Mich. 1974); *Mad Hatter, Inc.* v. *Mad Hatters Night Club Co.*, 399 F. Supp. 889 E.D. Mich. 1972. In *McGraw* v. *Matthaei*, 340 F. Supp. 162 (E.D. Mich. 1972), it was stated:

> "Defendant has placed great emphasis on the fact that he was not physically present in the state when he executed the note. This court is of the opinion that one need not be physically present in the state to "transact business within the state". Modern technology has taken us far beyond the point where two men must stand in each other's physical presence to transact business." *Id*, at 164.

The District Court's finding that "Macy's only contact with Michigan was through the order of goods by mail from a corporation in Michigan" (Petitioners' Appendix, P. 4a) is a sufficient contact upon which to base limited in personam jurisdiction even if it were the only basis for jurisdiction.

In the *In-Flight Devices Corp.* case, *supre*, the Court of Appeals for the Sixth Circuit has stated:

> "Again, it must be emphasized that no particular type of physical contact is required as a jurisdictional prerequisite. A letter or a telephone call may, in a given situation, be as indicative of substantial involvement with the forum state as a personal visit by the Defendant or its agents." *Id*, at 235.

Petitioners cite numerous United States District Court, as well as State Court, decisions which hold a "passive" buyer immune from long-arm jurisdiction. Yet, the "passive-active" standard has never been an articulated Constitutional standard of review in such cases. Rather, it has been one of the many factors considered by courts in determining jurisdictional sufficiency. The existence or non-existence of minimum contacts must be established with reference to the facts of a particular case, rather

than on the basis of dogmatic rules or all-inclusive principles. *Velandra* v. *Regie Nationale Des Usines Renault*, 336 F. 2d 292, 295 (6th Cir. 1964). As the Sixth Circuit Court of Appeals pointed out in *In-Flight Devices Corp., supra*:

> "Our emphasis throughout this discussion has been not providing mechanical rules which can be followed with commendable precision, but on realistic appraisals of the merits of any jurisdictional question. This approach is consistent with the broad language of the long-arm statute we construe and the liberalizing trend in the interpretation of due process which has flowed in the wake of the *International Shoe* decision. We believe it is imperative that courts avoid resorting to artificial guidelines which simplify decision making, but obscure the realities of the situation. The courts must consider each long-arm question in relation to traditional notions of fair play which mark the outer limits of due process." *Id*, at 235-236.

The decisions which Petitioner cites, in which jurisdiction was denied over a buyer in the circumstances of Petitioners, were based upon statutes, most of which differ from the Michigan statute from which this case evolves. Many of the jurisdictional statutes from other states are construed in a more limited manner than that of Michigan.[4] These decisions will, therefore, differ and will be more restrictive in terms of the exercise of jurisdiction.

The assertion by a state of in personam jurisdiction over a foreign defendant not present within the territory of the forum, may be predicated upon certain "minimum contacts" of the defendant such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". *International Shoe Co.* v. *Washington*, 326 U.S. 310; *McGee* v. *International Life Insurance Co.*, 344 U.S. 220 (1957); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

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4. In fact, only a few jurisdictions in the United States have long-arm statutes similarly as broad as that of Michigan, e.g., N.H. Rev. State. Ann., Sec. 300:11; Ariz. Rules of Civ. Proc. Rule 4(e)(2); Cal. Corp. Code, Sec. 6500, Code of Civ. Proc., Sec. 411; N.H. Civ. Prac. Rules, R.R. 4:4-4; Tenn. Code Ann., Secs. 20-235, 20-236, 20-237; Vernon's Tex. Stat. of 1948, Art. 203(1)(b).

The Sixth Circuit Court of Appeals, based on the landmark decision of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and the later Supreme Court decisions of *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), and *Hanson* v. *Denckla*, 357 U.S. 235 (1958), has adopted a three-fold mode of analysis for determining the "due process" boundaries of constitutionally permitted in personam jurisdiction:

> "First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *Southern Machine Co.* v. *Mohasco Industries, Inc.*, 401 F. 2d 374, 381 (6th Cir. 1968).

The first criteria, purposeful action by the Defendant, is illustrated by the following quotation from *In-Flight Devices Corp., supra:*

> "The "acts" (of defendant) become purposeful if the defendant should have reasonably foreseen that the transaction would have consequences in that state'." *Id*, at 226.

That Petitioners have acted in such a manner is clear. Macy's entered into contract negotiations involving a substantial order for the manufacture and shipment of goods with a firm which it knew was based in Michigan. Petitioners knew that the making, and subsequent breaking, of a contract with Microelectronics must have substantial consequences within the State of Michigan.[5]

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5. The District Court, in accord with this view, has also held that it is enough that a foreign defendant has become involved in Michigan through intentional actions, freely performed. *Mad Hatter, Inc.* v. *Mad Hatters Night Club Co.*, 399 F. Supp. 889 (E.D. Mich. 1975).

Applying the second criteria set forth in *Southern Machine, supra*, it is clear that the cause of action arises from Microelectronic's effort to enforce that contract. Again, the Opinion of the District Court is in accord. (Petition Appendix, P. 7a). Not only have Petitioners negotiated a contract, where delivery was to be performed in Michigan, but they have also become owners of personal property located in Michigan. Respondents' cause of action is to enforce the contract as made and to compel payment for goods that have become the property of Macy's. Simply, the cause of action flows directly from Macy's activities in Michigan.

The third criteria of *Southern Machine, supra*, requires that the act or consequences caused by the defendant have a substantial enough connection with the forum to make the exercise of jurisdiction reasonable. The reasonableness and validity of finding that jurisdiction exists in any case involving "minimum contacts" must be considered with reference to the facts of the particular case. Petitioners argue, that in personam jurisdiction must be based on such contacts with the State as lead to the judgment that it is fundamentally fair to summon and return the defendant to the forum. (Petition, P. 12). Determining "fairness" is an exercise of judicial discretion. The contract, along with the ownership and possession of property in the State of Michigan have been established. Macy's has sufficient contacts in the forum state. These contacts, together with consideration of the largely multi-state nature of Macy's commercial activities, make the exercise of jurisdiction in this case not only fair but reasonable. The District Court indicates in its Opinion, "Distance is no longer a factor . . . In a commercial sense business activity realistically is not concerned with state boundaries." (Petition Appendix, P. 7a). This is not to be interpreted as "obliterating" state lines by dispensing with any minimum contacts by the defendant. Rather, it is one of the many realities of commercial transactions to be considered in determining the reasonableness of the exercise of long-arm jurisdiction once minimum contacts have been established. In this sense, the attitude espoused by the District Court has not "spawned" an unwarranted extension of the reach of State judicial process as asserted by Petitioners, (Petition, P. 12) but has indicated the fundamental fairness of exercising in personam jurisdiction under such circumstances. In fact, this Court has indicated that it is in accord with such a view:

> "... a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee* v. *International Life Insurance Co.*, 344 U.S. 220 (1957).

Finally, the underlying purpose of long-arm jurisdiction statutes in general is fairness to the non-resident defendant and a lack of suprise. *In-Flight Devices Corp., supre,* indicates:

> "A purchaser who engages in an essentially one state operation—and occasionally buys an item or two out of state, for instance, is far more likely to be unprepared to deal with out of state litigation than an individual or corporation whose business frequently involves him or it in interstate transactions. The existence of substantial interstate business in general cannot substitute for some direct contacts with the forum state . . . but where such direct contact consists primarily of the entering of a contact with a resident of the forum state by the non-resident defendant the general interstate involvement of the defendant is suggestive of the latters expectation that it may be involved in litigation far from its home base." *Id,* at 233-234.

Here, the interstate activities of Macy's and its' subsidiary, Bamberger's, is extensive. It is hardly unfair to Petitioners, or surprising to them, that they are called upon to defend in a forum separate or distinct from their home base. And certainly it does not fly in the face of "traditional notions of fair play and substantial justice" as required in *International Shoe, supra,* to require

Petitioners to defend in Michigan, even though such jurisdiction be based upon minimal contacts with that forum.

III. PETITIONERS ARE ALSO SUBJECT TO MICHIGAN LIMITED IN PERSONAM JURISDICTION BASED UPON THE "OWNERSHIP, USE OR PROFESSION" OF ANY REAL OR TANGIBLE PERSONAL PROPERTY SITUATED WITHIN THE STATE.

Mich. Comp. Laws Ann. 600.715(3) provides in part that:

> "Sec. 715. The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:
>
> * * *
>
> (3) The ownership, use or possession of any real or tangible personal property situated within the state."

Macy's purchase order (Exhibit H to Affidavit of Norman Merinstein, Exhibit F to Petition for Writ of Mandamus) provides that the goods were to be delivered F.O.B. Madison Heights, Michigan. Pursuant to The Uniform Commercial Code, specifically Mich. Comp. Laws Ann. 440.2401(2)(a) and 440.2509(1)(b), (See Appendix "A"), Macy's became the owner of the goods and took possession of the goods (personal property) at the point where risk of loss and title passed to them—*in Michigan*. Macy's further directed Microelectronics to deliver the shipment to a designated "preferred carrier" as its agent to receive the goods. Macy's also imposed the penalty of non-payment of freight charges if these conditions were violated. Microelectronics was not to insure the goods, but merely to deliver them to the Macy's designated carrier *in Michigan*. Thus, Macy's had an insurable interest in goods and undertook risk of loss or damage, and pursuant to Mich. Comp. Laws Ann 600.715(3), acquired ownership and possession of personal property while situated within the State of Michigan.

The above factor, alone, is sufficient to sustain jurisdiction.

CONCLUSION

For the reasons stated herein, the Petitioners' request for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
DEC 30 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-581

R. H. MACY & CO., INC. and BAMBERGER'S,
a division of R. H. MACY & CO., INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN and MICROELECTRONIC SYSTEMS CORPORATION OF AMERICA, as Real Party in Interest,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Although respondent itself quotes the District Court's finding that "Macy's only contact with Michigan was through the ordering of goods by mail from a corporation in Michigan" (Brief in Opposition, p. 8), it devotes its brief largely to attempting to show that, in fact, there were

other contacts with the State of Michigan.* For the first time, also, it argues that this case involves "harsh disagreement regarding the proper exercise of the District Court's discretionary powers" (Brief in Opposition, p. 5).

1.

There is no factual dispute in these cases other than the District Court's clearly erroneous finding that Macy's had contact with Michigan "through the ordering of goods by mail" (see Petition, p. 6), if indeed that finding means that *Macy's* ordered by mail, despite the Court's simultaneous finding that the orders were "forwarded to Micro" by Micro's independent manufacturer's representative who personally received the orders in New York and New Jersey. (Petition, Appendix A, pp. 4a, 3a).

2.

Moreover, respondent simply cannot mean that these cases involve a question about the District Court's discretionary powers. Clearly, the District Court has no discretion insofar as its constitutional jurisdiction is concerned. If respondent be taken to mean that there is disagreement about whether the District Court properly exercised its decisional powers, then we are back to a record of undisputed facts establishing that petitioner had no contact with the State of Michigan and not to a record, which respondent erroneously postulates, of disputed evidence of contacts.

* Since the District Court found that apart from the putative mail order there was *no* contact with Michigan, all respondent's suggestions which pervade its brief that there were "other relevant events" (Brief in Opposition, p. 2) are mere argumentation. Respondent made the same contentions in the District Court about the consequences of delivery F.O.B. to a preferred carrier as it seeks to make here, and similarly ignored the express terms of the purchase orders under which title and risk of loss did not pass in Michigan (see Petition, p. 6); the District Court nevertheless did not find contacts with Michigan on the basis of such contentions.

3.

Just as respondent attempts to establish factual disputes which do not exist, it asserts also non-existent differences in the relevant long-arm statutes. Petitioner relies upon the decisions of two United States Courts of Appeals, nine United States District Courts, and fifteen State Courts in long-arm jurisdiction cases (Petition, pp. 9-11), to support its demonstration that the District Court in this case so clearly departed from accepted legal standards that review by this Court is necessary. Respondent says that "[t]he decisions which Petitioner cites, in which jurisdiction was denied over a buyer in the circumstances of Petitioners, were based upon statutes, most of which differ from the Michigan statute from which this case evolves. Many of the purisdictional statutes from other states are construed in a more limited manner than that of Michigan." (Brief in Opposition, p. 9).

Petitioner and respondent agree that Michigan has construed "its long-arm statute as being the broadest grant of jurisdiction consistent with the Constitutional requirements of due process." (Petition, p. 7; Brief in Opposition, p. 7, n. 2). Contrary to respondent's assertion, however, of the cases cited by petitioner, ten of the eleven decisions by federal courts and ten of the fifteen decisions by State courts explicitly rely on the due process standard set forth in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), in construing the statutes there involved to determine their reach, and nevertheless hold that a buyer in the circumstances of petitioner is not subject to a long-arm statute, so construed as exercising the broadest limits of State power.

Conclusion

On the undisputed facts, the District Court departed from the accepted standards for the constitutional exercise of jurisdiction, and the Court of Appeals failed to correct that serious lapse by mandamus. Ultimate appeal from an adverse final decision of the District Court after a full trial is not a "readily available alternative remedy" (Brief in Opposition, p. 2).* The petition for a writ of certiorari, therefore, should be granted so that this Court may affirm that the writ of mandamus should be used to confine the inferior Courts to their constitutional jurisdiction.

Respectfully submitted,

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* Respondent itself cites *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028 (2nd Cir. 1971), to the effect that "the purpose of the All Writs Act (28 U.S.C.A. §1651), is to enable federal appellate courts to review by mandamus, non-appealable interlocutory orders which would be the subject of review on appeal from a final judgment" (Brief in Opposition, p. 4).